82-963 82-1711 82-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-963

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

No. 82-1711

STATE OF COLORADO,

Petitioner,

vs.

FIDEL QUINTERO,

Respondent.

No. 82-1771

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALBERTO ANTONIO LEON,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, THE SUPREME COURT OF COLORADO, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether this Court should adopt an exception to the Fourth Amendment Exclusionary Rule that will permit the admissibility of evidence that would otherwise be suppressed, where law enforcement officers act in an objective good faith belief that their conduct is proper.

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BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for the various parties, and letters of consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity carry out its guiding purpose since its founding in 1950 of reforming the criminal justice system for the benefit of all our citizens.

The prosecutors of this nation are fully conversant with the problems faced by state and federal law enforcement officers in their good faith attempts to conduct criminal investigations and gather evidence by using investigative procedures that comply with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. It was noted by David L. Armstrong, Commonwealth Attorney, Louisville, Kentucky, former President of NDAA, in his testimony before the Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on April 20, 1982, on the federal Exclusionary Rule reform bills (S. 101, S. 751), that it is the *prosecutor* upon whom the heaviest burden of the Rule rests. The prosecutor must not only act as a guide for the police in tracing their way through this maze of rules, but must shoulder the responsibility for unsuccessful prosecution when a trial or appellate court suppresses vital and reliable evidence. Since the Rule also exacts a heavy price from Society by freeing guilty persons, continuation of the Rule in its absolute form can no longer be justified. As noted by Edwin L. Miller, Jr., District Attorney, San Diego, California, President of NDAA, in his testimony on May 11, 1983, before the Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on behalf of NDAA and in favor of the Exclusionary Rule reform provisions of then-pending S. 829:

> One of the more pernicious aspects of the Exclusionary Rule in its present form, is that it protects *only* the criminal and does nothing for the innocent citizen who is wrongly

stopped or searched by police. It is an ignoble judicial rule which gives 100% of its benefits—in every case at every time, with no exceptions—to criminals, at the expense of honest citizens.

Amicus argued for adoption of the good faith exception to the Exclusionary Rule in the case of *Illinois v. Gates*, ____ U. S. ____, 103 S. Ct. 2266 (1983) in the last Term of this Honorable Court. We understand the reasons why the Court chose not to reach the issue in that case. We believe that the issue is squarely and appropriately presented in all three of the cases now before this Court, and we respectfully resubmit the arguments that we asked the Court to consider in *Gates*.

STATEMENT

In its opinion in *Commonwealth* v. *Sheppard*, 441 N. E. 2d 725 (Mass. 1982), the court held that evidence seized under a warrant that, because of the good faith negligence of the issuing magistrate, failed to describe the items to be seized, had to be suppressed under the Fourth Amendment Exclusionary Rule. In doing so, the court based its decision squarely on the Fourth Amendment, noting, "... we need not consider whether the evidence should be suppressed pursuant to the laws of this Commonwealth. To this date this court has not adopted an exclusionary rule under the law of the Commonwealth to remedy a violation of a criminal defendant's art. 14 [of the Massachusetts Declaration of Rights] rights." 441 N. E. 2d at 736. Article 14 is the Commonwealth's equivalent of the Fourth Amendment.

In *Colorado* v. *Quintero*, 657 P. 2d 948 (Colo. 1983), the court held that the fact that the respondent was a stranger to a neighborhood, acted suspiciously, and was in possession of a television set that he tried to cover with his shirt, was insufficient to establish probable cause for his arrest in a situation where the police lacked evidence that a crime had been committed. The court declined to apply a Colorado statute adopted in 1981 (C.R.S. 1973, 16-3-308) which renders evidence admissible when seized as a result of a "good faith mistake", taking the position that the statute contemplated a misperception of an existing fact, whereas the case actually involved a mistaken judgment of law, and that the good faith exception had not been adopted by the U. S. Supreme Court. 657 P. 2d at 950-51.

Finally, in *United States* v. *Leon*, 701 F. 2d 187 (9th Cir. 1983), the court held that a federal trial judge properly suppressed evidence seized pursuant to a search warrant, issued by a state magistrate, on the ground that the affidavit in support of the warrant was inadequate. Although invited by the Government to recognize a good faith exception to the Ex-

clusionary Rule, the court stated, "[w]e have not heretofore recognized such an exception and we decline the invitation to recognize one at this juncture." Petition for Writ of Certiorari, *U. S.* v. *Leon*, 82-1771, Appendix A, p. 4. Nevertheless, the federal trial judge found that the law enforcement officers acted in good faith, and this finding was not disturbed by the Ninth Circuit Court of Appeals.

Thus, *amicus* submits that the issue of a good faith exception to the Exclusionary Rule is appropriately before this Court in these three cases—in warrantless as well as warrant settings, and that the Court can and should now address the question framed originally in its order of November 29, 1982, in *Illinois* v. *Gates*, *supra*, "... whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Weeks* v. *United States*, 232 U. S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."

SUMMARY OF ARGUMENT

Applying the Fourth Amendment Exclusionary Rule in cases where law enforcement officers have acted in objective good faith no longer serves the purposes for which the Rule was originally intended. We ask this Court to adopt a good faith exception to the Rule not only in cases where a search warrant has been issued by an impartial magistrate, as in *Commonwealth* v. *Sheppard*, *supra*, and *U. S.* v. *Leon*, *supra*, but also in *all* appropriate cases where the police have acted in the objective good faith belief that their conduct conformed to the requirements of the Fourth Amendment, as in the warrantless case of *Colorado* v. *Quintero*, *supra*.

ARGUMENT

IF THIS COURT FINDS THAT THE EVIDENCE IN ANY OF THESE CASES WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, IT SHOULD ADOPT AND APPLY AN EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE THAT WOULD PERMIT THE ADMISSIBILITY OF EVIDENCE WHERE LAW ENFORCEMENT OFFICERS HAVE ACTED IN AN OBJECTIVE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

There is probably no better description of the Exclusionary Rule's basic defect, and the appropriate remedy for such defect, than the recommendation of the Attorney General's Task Force on Violent Crime in its Final Report of August 17, 1981:

> The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the **reasonable, good faith belief** that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief.

Attorney General's Task Force on Violent Crime, 29 CrL 3131, 3134 (1981) (emphasis supplied).

Although *amicus* previously recommended outright abolition of the Rule, see National Prosecution Standards, Standard 19.11, and Commentary, *Exclusionary Rule*, p. 356, National District Attorneys Association (1977), we adopted the Attorney General's Task Force recommendations at our Board of Direc-

tors meeting on October 8, 1981, as a reasonable alternative that will effectively address the proper concerns of all participants in the criminal justice system. We do not believe, however, that this Court should limit the application of such an exception to warrant cases only, and we have supported legislation that would provide for a general good faith exception. Statement of David L. Armstrong, former President, NDAA, before Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on April 20, 1982; Statement of Edwin L. Miller, Jr., President, NDAA, before Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on May 11, 1983. See also, Miller, *The Exclusionary Rule and Its Alternatives*, 12 The Prosecutor 335 (1977); Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives*, 15 The Prosecutor 348 (1981).

In this regard we believe that the Colorado good faith exception statute, C.R.S. 1973, 16-3-308 (1981), written by former Denver District Attorney Dale Tooley, and the similar Arizona state, A.R.S., 13-3925 (1982), serve as examples for the states because they test good faith by an objective standard, rather than simply by the subjective beliefs of a police officer that his conduct conforms to the Fourth Amendment. We note also the recent promulgation of a Model State Statute on Exclusionary Rule Limitations by Americans for Effective Law Enforcement, Inc. The Model Statute uses an objective standard, and we anticipate that it will be used by many states in drafting their statutes in this area.

Although statutory reform at the state and federal levels is highly desireable, caselaw development has been the primary vehicle for reform of the Exclusionary Rule, and we support this development. The seminal case in the adoption of the good faith exception by the courts is *United States* v. *Williams*, 622 F. 2d 830 (5th Cir.), *cert. den.*, 101 S. Ct. 946 (1981), where the Fifth Circuit Court of Appeals, sitting *en banc*, stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery,

> it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence.

622 F. 2d 830, 846-7.

In adopting this approach, the *Williams* Court noted that an officer's subjective belief concerning the legality of a search would not suffice. Ignorance of the basic principles of criminal procedure would not constitute good faith. The police officer's actions are subject to an objective test and must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d at 847.

The *Williams* Court, we believe, put to rest the argument of the respondents that the Exclusionary Rule is needed to deter police misconduct: "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d at 842. The court stated that the Rule should apply only when that application can serve its originally intended purpose, i.e., deterrence. 622 F. 2d at 847.

The growing dissatisfaction with the absolute application of the Exclusionary Rule has prompted several other courts to recognize a good faith exception to the Rule. *See e.g., United States* v. *Ajlouny*, 629 F. 2d 830, 840-42 (2d Cir. 1980), *cert. den.*, 449 U. S. 1111 (1981) (good-faith mistake of law); *State* v. *Lehnen*, 403 So. 2d 683 (La. 1981) (mistake of fact); *Nix* v. *State*, 621 P. 2d 1347, 1349-50 (Alas. 1981) (consent to search; good-faith mistake of fact); *Richmond* v. *Commonwealth*,[1] 28

[1] The Supreme Court of Kentucky affirmed on other grounds at 29 K. L. S. 10 (Ky. 1982), taking the position that magistrates have statewide jurisdiction to issue search warrants under the Kentucky Constitution.

K. L. S. 10, 29 Cr L 2529 (Ky. App. 1981), *aff'd.*, 29 K. L. S. 10 (Ky. 1982) (mistake of law); *People* v. *Adams*, 53 N. Y. 2d 1, 442 N. E. 2d 537 (1981) (exigency; mistake of fact); *Commonwealth* v. *Bradshaw*, 434 A. 2d 181, 183 (Pa. 1981) (good-faith but mistaken belief in informant's information). In each of these cases, the courts have recognized that the original deterrance rationale for the rule—if it *ever* was valid—has been eroded to the point of non-existence, and these courts have wisely applied the principle that "[w]here the reason for the rule ceases, its application must cease also." *United States* v. *Williams*, 622 F. 2d at 840; *see*, Attorney General's Task Force on Violent Crime, *supra*, at 3134 (1981).

Whatever deterrence the Rule has achieved has, moreover, been obtained at high cost. As a study of the National Institute of Justice released on December 17, 1982, noted, one out of every three persons arrested in Los Angeles, California, on felony drug charges, was not brought to trial because the police committed errors in seizing evidence, and that approximately half of the defendants released in that State because of the Exclusionary Rule were arrested within two years for new offenses. Bosarge, *NIJ Study Finds Exclusionary Rule Has Major Negative Impact on Prosecuting Drug Cases*, 16 Crime Control Digest, No. 52, p. 1 (1982). *Amicus* submits that the statistics cited in the NIJ report amply justify concern with an application of the Rule that fails to recognize an exception for police officers acting in objective good faith. The main effect of the Rule seems not to have been the deterrence of police misconduct, but, rather, the deterrence of convictions of those who continue to prey upon our law-abiding citizens.

Perhaps no better statement of the pervasive discontent with the Rule because of its inherent inadequacy and ineffectiveness—as well as its intolerable excesses—exists than the statement by former Los Angeles, California, District Attorney, John K. Van de Kamp, now California Attorney General:

A review of the rule's application and development leads to the following conclusions:

• It has failed to live up to the expectations of those who framed it.

• Despite the dramatic improvement in police professionalism, the rule itself is of questionable effectiveness in deterring instances of improper police conduct.

• The statutory rules and case law governing search and seizure have become so complex and change so frequently that no law enforcement officer can be reasonably expected to know them in their entirety. This is also true of the rules governing arrest, confessions, line-ups and other areas of police procedure where the exclusionary rule comes into play.

• As a consequence of its implementation, truthful, reliable and probative evidence is kept from the trier of fact in criminal cases. As a result, guilty persons sometimes go free. On occasion, cases are so weakened by the loss of the excluded evidence that a conviction—if it can be obtained at all—can only be obtained on charges less substantial than those for which a defendant is guilty in fact.

Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives,* 15 The Prosecutor 348 (1981).

We also join with Justice White in his concurring opinion in *Illinois v. Gates, supra,* in noting the futility of further pursurance of a mechanical application of the Rule; such a pursuit does not take into account the realities of present day law enforcement and the societal costs of applying the Rule. ___U. S. ___, ___, 103 S. Ct. 2317, 2342-2344.

Amicus believes that to apply the Exclusionary Rule in cases such as the instant cases, where law enforcement officers have acted in objective good faith, serves no good purpose whatsoever. It is, indeed, time for a change, as the many *amici* supporting the petitioners in these cases have urged. Although prosecutors have been in the vanguard of state and federal

legislative and judicial reform of the Rule, we must look to the United States Supreme Court for a final answer to this issue. The prosecutors of this nation know that this Honorable Court will give this matter—which is probably the most important criminal justice issue of the 20th Century—careful and balanced consideration.

CONCLUSION

Amicus respectfully submits that the Exclusionary Rule should not be applied in these cases. They present a timely and appropriate opportunity for the Court to adopt an objective good faith exception to the Exclusionary Rule. We ask that the decisions of the Supreme Judicial Court of Massachusetts, the Supreme Court of Colorado, and the Ninth Circuit Court of Appeals, be reversed on the facts and law, and on the basis of sound judicial policy.

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